HOMICIDE IN SELF-DEFENCE.

§ 1. Excusable Killing in Self-Defence.

According to the modern law, one who kills another in the necessary defence of himself from death or even from serious bodily harm is excused, and, if indicted, should be acquitted.[1] In the old law the rule was different; the killing was illegal and the accused was convicted, though he was pardoned as of course.[2] The gradual development of the modern doctrine has been traced elsewhere.[3]

§ 2. Apparent Necessity.

The right of one assailed to kill in self-defence does not depend upon the actual existence in fact of the necessity for killing; it is enough that the exigency reasonably appears to the assailed to make killing necessary.[4]

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[1] R. *v.* Bull (1839) 9 C. & P. 22; S. *v.* Burke (1870) 30 Ia. 331; C. *v.* Mann (1874) 116 Mass. 58; S. *v.* Brooks (1889) 99 Mo. 137, 12 S. W. Rep. 633; Shorter *v.* P. (1849) 2 N. Y. 193; Young *v.* S. (1850) 11 Humph. 200.

[2] 2 Pollock & Maitland, History of the Law 476.

[3] 16 Harvard Law Review 567.

[4] U. S. *v.* Wiltberger (1819) 3 Wash. C. C. 515; R. *v.* Weston (1879) 14 Cox C. C. 346; Acers *v.* U. S. (1896) 164 U. S. 388; Addington *v.* U. S. (1896) 165 U. S. 184; Oliver *v.* S. (1850) 17 Ala. 587; Thomas *v.* S. (1895) 106 Ala. 19, 17 So. Rep. 460; Smith *v.* S. (1894) 59 Ark. 132, 26 S. W. Rep. 712; P. *v.* Hurley (1857) 8 Cal. 390; P. *v.* Anderson (1872) 44 Cal. 65; P. *v.* Herbert (1882) 61 Cal. 544; P. *v.* Bruggy (1892) 93 Cal. 476, 29 Pac. Rep. 26; P. *v.* Hyndman (1893) 99 Cal. 1, 33 Pac. Rep. 782; U. S. *v.* Herbert (1853) 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354*a*; Pinder *v.* S. (1891) 27 Fla. 370, 8 So. Rep. 837; Garner *v.* S. (1891) 28 Fla. 113, 9 So. Rep. 835; Redd *v.* S. (1896) 99 Ga. 210, 25 S. E. Rep. 268; Campbell *v.* P. (1854) 16 Ill. 17; Schnier *v.* P. (1859) 23 Ill. 17; Maher *v.* P. (1860) 24 Ill. 241; Roach *v.* P. (1875) 77 Ill. 25; Steinmeyer *v.* P. (1880) 95 Ill. 383; Panton *v.* P. (1885) 114 Ill. 505, 2 N. E. Rep. 411; Enright *v.* P. (1895) 155 Ill. 32, 39 N. E. Rep. 561; Wall. *v.* S. (1875) 51 Ind. 453; West *v.* S. (1877) 59 Ind. 113; Hays *v.* S. (1881) 77 Ind. 450; S. *v.* Collins (1871) 32 Ia. 36; S. *v.* Fraunburg (1875) 40 Ia. 555; S. *v.* Archer (1887) 69 Ia. 420, 29 N. W. Rep. 333; S. *v.* Shelton (1884) 64 Ia. 333, 20 N. W. Rep. 459; S. *v.* Potter (1874) 13 Kan. 414; S. *v.* Bohan (1877) 19 Kan. 28; Meridith *v.* C. (1857) 18 B. Mon, 49; Holloway *v.* C. (1875) 11 Bush. 344; Munday *v.* C. (1883) 81 Ky. 233; Price *v.* C. (1808) 1 Bibb. 173; Amos *v.* C. (1822) 16 Ky. L. Rep. 358, 28 S. W. Rep. 152; S. *v.* Chandler (1850) 5 La. Ann. 489; S. *v.* St. Geme (1879) 31 La. Ann. 302; S. *v.* Scossoni (1896) 48 La. Ann. 1464, 21 So. Rep. 32; S. *v.* Sadler (1899) 51 La. Ann. 1397, 26 So. Rep. 390; Pond *v.* P. (1860) 8 Mich. 150; Bangs *v.* S. (1882) 60 Miss. 571; Johnson *v.* S. (1900) 78 Miss. 627, 27 So. Rep. 880; S. *v.* Sloan

The defendant must actually have believed that he was in urgent danger; it is not enough to show that there were reasonable grounds for the belief, the *bona fide* existence of the belief must also be proved,[1] and it must further be shown that the defendant acted upon the belief.[2] It is not enough, however, that the defendant honestly believed the killing to be necessary; the circumstances must have been such as to make the belief reasonable.[3] The defendant must therefore take the risk of the jury pronouncing the belief upon which he acted unreasonable.[4]

(1871) 47 Mo. 604; S. *v.* Eaton (1882) 75 Mo. 586; S. *v.* Harrod (1891) 102 Mo. 590, 15 S. W. Rep. 373; S. *v.* Pennington (1898) 146 Mo. 27, 47 S.W. Rep. 799; S. *v.* Sloan (1899) 22 Mont. 293, 56 Pac. Rep. 364; Barr *v.* S. (1895) 45 Neb. 458, 63 N. W. Rep. 856; Marts *v.* S. (1875) 26 Oh. S. 162; Logue *v.* C. (1861) 38 Pa. 265; Murray *v.* C. (1875) 79 Pa. 311; S. *v.* McGreer (1880) 13 S. C. 464; S. *v.* Symmes (1893) 40 S. C. 383, 19 S. E. Rep. 16; S. *v.* Petsch (1894) 43 S. C. 132, 20 S. E. Rep. 993; Barnards *v.* S. (1899) 88 Tenn. 183, 12 S. W. Rep. 431; Marnoch *v.* S. (1879) 7 Tex. App. 269; Richardson *v.* S. (1879) 7 Tex. App. 486; Jordan *v.* S. (1881) 11 Tex. App. 435; Nalley *v.* S. (1890) 28 Tex. App. 387, 13 S. W. Rep. 670; Cochran *v.* S. (1889) 28 Tex. App. 422, 13 S. W. Rep. 651; Reeves *v.* S. (1895) 34 Tex. Cr. 483, 31 S. W. Rep. 382; Casner *v.* S. (Tex. 1900) 57 S. W. Rep. 821; Norris *v.* S. (Tex. 1901) 61 S. W. Rep. 493; Graham *v.* S. (Tex. 1901) 61 S. W. Rep. 714; Kelly *v.* S. (Tex. 1901) 62 S.W. Rep. 915; Stoneman *v.* C. (1874) 25 Grat. 887; Brown *v.* C. (1890) 86 Va. 466, 10 S. E. Rep. 745; White *v.* T. (1892) 3 Wash. T. 397, 19 Pac. Rep. 37; S. *v.* Cain (1882) 20 W. Va. 679.

[1] Jones *v.* S. (1884) 76 Ala. 8; Howard *v.* S. (1896) 110 Ala. 92, 20 So. Rep. 365; P. *v.* Gonzales (1887) 71 Cal. 569, 12 Pac. Rep. 783; Lovett *v.* S. (1892) 30 Fla. 142, 11 So. Rep. 550; Trogdon *v.* S. (1892) 133 Ind. 1, 32 N. E. Rep. 725; S. *v.* Smith (1892) 114 Mo. 406, 21 S. W. Rep. 827; Rippy *v.* S. (1858) 2 Head 218.

[2] Walker *v.* S. (1895) 97 Ga. 350, 23 S. E. Rep. 992.

[3] De Arman *v.* S. (1882) 71 Ala. 351; Holley *v.* S. (1883) 75 Ala. 14; Nabors *v.* S. (1899) 120 Ala. 323, 25 So. Rep. 529; P. *v.* Williams (1867) 32 Cal. 280; P. *v.* Donguli (1892) 92 Cal. 607, 28 Pac. Rep. 782; S. *v.* Brown (Del. 1902) 53 Atl. Rep. 354; Gladden *v.* S. (1868) 12 Fla. 562; Alvarez *v.* S. (1899) 41 Fla. 532, 27 So. Rep. 40; Morrison *v.* S. (1900) 42 Fla. 149, 28 So. Rep. 97; Gallery *v.* S. (1873) 92 Ga. 463, 17 S. E. Rep. 863; S. *v.* Abarr (1869) 39 Ga. 185; S. *v.* Swift (1859) 14 La. Ann. 827; S. *v.* Shippey (1865) 10 Minn. 223; Wesley *v.* S. (1859) 37 Miss. 327; Hall *v.* S. (Miss. 1887) 1 So. Rep. 351; S. *v.* O'Connor (1860) 31 Mo. 389; S. *v.* Stockton (1875) 61 Mo. 382; S. *v.* Parker (1891) 106 Mo. 217, 17 S. W. Rep. 180; S. *v.* Smith (1901) 164 Mo. 567, 65 S. W. Rep. 270; Housh *v.* S. (1894) 43 Neb. 163, 61 N. W. Rep. 571; Darling *v.* Williams (1878) 35 Oh. S. 58; S. *v.* Morey (1894) 25 Or. 241, 36 Pac. Rep. 573; S. *v.* Tarter (1894) 26 Or. 38, 37 Pac. Rep. 53; S. *v.* Wyse (1890) 33 S. C. 594, 12 S. E. Rep. 556; Frank *v.* S. (1896) 94 Wis. 211, 68 N. W. Rep. 657.

[4] Keith *v.* S. (1893) 97 Ala. 32, 11 So. Rep. 914; Smith *v.* S. (1875) 25 Fla. 517, 6 So. Rep. 482; S. *v.* Thompson (1859) 9 Ia. 188; S. *v.* Barkley (1891) 109 Mo. 665, 19 S. W. Rep. 192; S. *v.* Bryson (1864) 2 Winst. 86; S. *v.* Harris (1853) 1 Jones N. C. 190; Williams *v.* S. 2 Tex. App. 271; Watts *v.* T. (1870) 1 Wash. T. 409.

The question is not generally held to be, was the apprehension reasonable in such a man as the defendant, but, was it such fear as a reasonable man would have felt under the circumstances;[1] and therefore the jury cannot consider the peculiarities of the defendant, as that he was a coward,[2] or of immature judgment,[3] or of a nervous temperament,[4] nor can they consider the fact that he was drunk, and acted under a drunkard's imperfect apprehension.[5] But the reasonableness of the apprehension is to be judged according to the circumstances of the case; and it is therefore proper to prove that the deceased was of a quarrelsome disposition,[6] and that he had threatened the defendant's life to the defendant's knowledge.[7]

§ 3. Imminent Necessity.

In order to excuse homicide on the ground of self-defence, the danger must not only be threatened or prospective; it must be pressing and urgent. The killer cannot act on his fear of future death, no matter how well justified; there must be a present danger, caused by some act or

[1] S. *v.* Sterrett (1886) 68 Ia. 76, 25 N. W. Rep. 936; S. *v.* Cadotte (1896) 17 Mont. 315, 42 Pac. 857. Thus in Tennessee, where it was at first held that an honest belief was enough (Grainger *v.* S. (1833) 5 Yerg. 459), it is now clear that the apprehension must have rested on "reasonable grounds." Morgan *v.* S. (1856) 3 Sneed, 475; McDonald *v.* S. (1890) 89 Tenn. 161, 14 S. W. Rep. 487. In some jurisdictions, however, the honest belief, reasonable from the point of view of the defendant, is enough. Thus in Arkansas it is enough if the defendant acted upon an honest belief held without negligence; Smith *v.* S. (1894) 59 Ark. 132, 26 S. W. Rep. 712. In Indiana the fear need not be that of a reasonable man, but it must be a reasonable fear. Batten *v.* S. (1881) 80 Ind. 394; (see Hicks *v.* S. (1875) 51 Ind. 407; Bryant *v.* S. (1885) 106 Ind. 549, 7 N. E. Rep. 217).

[2] S. *v.* Sterrett (1886) 68 Ia. 76, 25 N. W. Rep. 936.

[3] S. *v.* Sterrett (1886) *supra.*

[4] Morris *v.* C., 6 Ky. L. Rep. 370.

[5] Springfield *v.* S. (1892) 96 Ala. 81, 11 So. Rep. 250; S. *v.* Mullen (1859) 14 La. Ann. 570.

[6] S. *v.* Middleham (1883) 62 Ia. 150, 17 N. W. Rep. 446; S. *v.* Garic (1883) 35 La. Ann. 970; P. *v.* Harris (1893) 95 Mich. 87, 54 N. W. Rep. 648; Wesley *v.* S. (1859) 37 Miss. 327.

[7] R. *v.* Weston (1879) 14 Cox C. C. 346; P. *v.* Scoggins (1869) 37 Cal. 676; U. S. *v.* Leighton (1882) 3 Dak. 29, 13 N. W. Rep. 347; McDuffie *v.* S. (1892) 90 Ga. 786, 17 S. E. Rep. 105; Brownell *v.* P. (1878) 38 Mich. 732; S. *v.* Evans (1877) 65 Mo. 574; S. *v.* Harris (1881) 73 Mo. 287; Rippy *v.* S. (1858) 2 Head 218; Sims *v.* S. (1880) 9 Tex. App. 586; Alexander *v.* S. (1888) 25 Tex. App. 260, 7 S. W. Rep. 867.

demonstration of the deceased.[1] Even if the defendant knew that the deceased had threatened his life, that would not justify action in self-defence before any demonstration by the deceased of an intention to carry out his threat.[2] At the same time, threats of the deceased, as well as his quarrelsome character, might well justify "more prompt and decisive measures of defence" than would otherwise be lawful,[3] just as they may throw light on the reasonableness of defendant's apprehension. And even if there have been no threats, the defendant need not wait until the assailant's attack is on the point of success; until the assailant approaching with a knife actually comes within striking distance,[4] or until the assailant who is drawing a pistol points it with his finger on the trigger.[5]

In a series of cases in Kentucky the right to kill in self-defence before the danger was imminent was carried to the

[1]Acres *v.* U. S. *supra;* U. S. *v.* Outerbridge (1869) 5 Sawy. 620; Prichett *v.* S. (1853) 22 Ala. 39; Harrison *v.* S. (1854) 24 Ala. 67; Dupree *v.* S. (1859) 33 Ala. 380; Lewis *v.* S. (1874) 51 Ala. 1; Dolan *v.* S. (1886) 81 Ala. 11, 1 So. Rep. 707; Johnson *v.* S. (1877) 58 Ala. 57, 23 S. W. Rep. 7; P. *v.* Lombard (1861) 17 Cal. 316; U. S. *v.* Leighton (1882) 3 Dak. 29, 13 N. W. Rep. 347; S. *v.* Hollis, (1858) 1 Houst. Cr. 24; Roberts *v.* S. (1880) 65 Ga. 430; Price *v.* P. (1889) 131 Ill. 223, 23 N. E. Rep. 639; S. *v.* Sullivan (1879) 51 Ia. 142, 50 N. W. Rep. 572; S. *v.* Rose (1883) 30 Kan. 501, 1 Pac. Rep. 817; Kennedy *v.* C. (1879) 14 Bush 340; Parsons *v.* C. (1880) 78 Ky. 102; S. *v.* Scossoni (1896) 48 La. Ann. 1464, 21 So. Rep. 32; S. *v.* Kellogg (1901) 104 La. 580, 29 So. Rep. 285; Dyson *v.* S. (1853) 26 Miss. 362; Evans *v.* S. (1870) 44 Miss. 762; Scott *v.* S. (1877) 56 Miss. 287; S. *v.* Evans (1877) 65 Mo. 574; S. *v.* Thompson (1884) 83 Mo. 257; S. *v.* Bryant (1890) 102 Mo. 24, 14 S. W. Rep. 822; S. *v.* Kloss (1893) 117 Mo. 591, 23 S. W. Rep. 780; P. *v.* Cole (1857) 4 Park. Cr. 35; S. *v.* Green (1843) 4 Ired. 409; S. *v.* Howard (1891) 35 S. C. 197, 14 S. E. Rep. 481; Hull *v.* S (1880) 6 Lea 249; Lauder *v.* S. (1882) 12 Tex. 462; Hinton *v.* S. (1859) 24 Tex. 454; Johnson *v.* S. (1859) 24 Tex. 767; Myers *v.* S. (1870) 33 Tex. 525; Irwin *v.* S. (1875) 43 Tex. 236; Wright *v.* S. (1873) 40 Tex. Cr. 447, 50 S. W. Rep. 940; Byrd *v.* C. (1892) 89 Va. 536, 16 S. E. Rep. 727; Field *v.* C. (1892) 89 Va. 690, 16 S. E. Rep. 865.

[2]Karr *v.* S. (1893) 100 Ala. 4, 14 So. Rep. 851; P. *v.* Lynch (1894) 101 Cal. 229, 35 Pac. Rep. 860; Wilson *v.* P. (1880) 94 Ill. 299; S. *v.* Mullen (1859) 14 La. Ann. 570; S. *v.* Jackson (1892) 44 La. Ann. 160, 10 So. Rep. 600; S. *v.* Westlake (1901) 159 Mo. 669, 61 S. W. Rep. 243; S. *v.* Smith (1901) 164 Mo. 567, 65 S. W. Rep. 270; Rippy *v.* S. (1858) 2 Head 217; Hoover *v.* S. (1896) 35 Tex. Cr. 342, 33 S. W. Rep. 337.

[3]Karr *v* S. (1893) 100 Ala. 4, 14 So. Rep. 851; Watkins *v.* U. S. (1900) 3 Ind. Ter. 281, 54 S. W. Rep. 819; Byrne *v.* C. (1894) 16 Ky. L. Rep. 416, 28 S. W. Rep. 481; Phipps *v.* S. (1895) 34 Tex. Cr. 560, 31 S. W. Rep. 397; Stewart *v.* S. (1899) 40 Tex. Cr. 649, 51 S. W. Rep. 907.

[4] Fortenberry *v.* S. (1877) 55 Miss. 403.

[5]Goodall *v.* S. (1853) 1 Or. 334; Brady *v.* S. (Tex. 1901) 65 S. W. Rep. 521.

furthest admissible extreme. In Bohannon *v.* C.[1] the defendant's life having been threatened by the deceased, he armed himself and upon meeting the deceased killed him. The court held that if the defendant had met his enemy "having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast, nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him, but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting."

Here it was not required that the deceased should have made any hostile demonstration. In Kennedy *v.* C.[2] the right of self-defence was allowed, though the deceased made no hostile demonstration at the time; but stress was laid on the necessity of an apprehension of *present* danger. This requirement has been emphasized in the later cases;[3] but it appears still to be law in Kentucky that one may act upon a reasonable fear of immediate danger, although the deceased make no hostile demonstration.

As the defendant cannot kill until the danger appears imminent, so he cannot kill after the immediate danger is past; the right of self-defence, which begins only when the necessity begins, ends with the necessity also.[4] If the defendant followed his retreating adversary and killed him as he retreated, the law will not excuse the

[1] 8 Bush 481 (1871). [2] 14 Bush 340 (1878).

[3] Oder *v.* C. (1882) 80 Ky. 32; Parsons *v.* C. (1879) 78 Ky. 102; Turner *v.* C. (1886) 89 Ky. 78, 1 S. W. Rep. 475; Haverly *v* C. (1893) 95 Ky. 33, 23 S. W. Rep. 664; C. *v.* Rudert, 109 Ky. 22, 653 (1901) 60 S. W. Rep. 489.

[4] Acers *v.* S. (1896) 164 U. S. 388; Hughes *v.* S. (1897) 117 Ala 25, 23 So. Rep. 677; Chestnut *v.* S. (1900) 112 Ga. 366, 37 S. E. Rep. 384; Maurer *v.* S. (1891) 129 Ind. 587, 29 N. E. Rep. 392; Farris *v.* C. (1886) 8 Ky. L. Rep. 417, 1 S. W. Rep. 729; Guice *v.* S. (1883) 60 Miss. 714; Case *v.* S. (Miss. 1895) 17 So. Rep. 379; Brendendick *v.* S. (Tex. 1896) 34 S. W. Rep., 115.

the homicide.[1] This does not mean, however, that merely because the assailant is giving ground the defendant cannot act in self-defence; if he is retiring not to withdraw from the attack but to get a better vantage-ground for the combat the defendant is justified in continuing to act in defence.[2]

§ 4. Necessity Maliciously Caused by the Defendant.

The party who brings on a difficulty with the purpose of killing his adversary in the conflict can under no circumstances excuse a killing during the conflict.[3] This is true, not only when the defendant himself struck the first blow, but also when by insulting words he provoked his adversary to begin the affray.[4] The mere purpose in the defendant's mind to kill his adversary is, however, not enough to deprive him of the right of self-defence; to be put in such a position, he must in some way have brought on the affray.[5] "The true inquiry is whether he availed himself

[1] Evans *v.* S. (1861) 33 Ga. 4; Maurer *v.* S. (1891) 129 Ind. 587, 29 N. E. Rep. 392; S. *v.* Maloy (1876) 44 Ia. 104; White *v.* Maxcy (1877) 64 Mo. 552; S. *v.* Conally (1869) 3 Or. 69.

[2] Luckinbill *v.* S. (1889) 52 Ark. 45, 11 S. W. Rep. 963; Wright *v.* C. (1887) 8 Ky. L. Rep. 718, 2 S. W. Rep. 909; Stanley *v.* S. (Tex. 1898) 44 S. W. Rep. 519.

[3] Wallace *v.* U. S. (1895) 162 U. S. 466; Baker *v.* Kansas City Times Co. (1879) Fed. Cas. 773; Gibson *v.* S. (1889) 89 Ala. 121, 8 So. Rep. 98; Dabney *v.* S. (1896) 113 Ala. 38, 21 So. Rep. 211; Roach *v.* S. (1864) 34 Ga. 78; Roberts *v.* S. (1880) 65 Ga. 430; Wilson *v.* P. (1880) 94 Ill. 299; Barnett *v.* S. (1884) 100 Ind. 171; Voght *v* S. (1895) 145 Ind. 12, 43 N. E. Rep. 1050; S. *v.* Cross (1885) 68 Ia. 180, 26 N. W. Rep. 62; Logsdon *v.* C. (1897) 19 Ky. L. Rep. 413, 40 S. W. Rep. 775; S. *v.* Scott (1889) 41 Minn. 365, 43 N. W. Rep. 62; Helm *v.* S. (1890) 67 Miss. 562, 7 So. Rep. 487; Allen *v.* S. (1889) 66 Miss. 385, 6 So. Rep. 242; Thompson *v.* S. (Miss. 1891) 9 So. Rep. 298; Patterson *v.* S. (1898) 75 Miss. 670, 23 So. Rep. 647; S. *v.* Christian (1877) 66 Mo. 138; S. *v.* Maguire (1878) 69 Mo. 197; S. *v.* Herrell (1888) 97 Mo. 105, 10 S. W. Rep. 387; S. *v.* Bryant (1890) 102 Mo. 24, 14 S. W. Rep. 822; S. *v.* Pettit (1893) 119 Mo. 410, 24 S. W. Rep. 1014; S. *v.* Paxton (1894) 126 Mo. 500, 29 S. W. Rep. 705; S. *v.* Pennington (1898) 146 Mo. 27, 47 S. W. Rep. 799; Stewart *v.* S. (1852) 1 Oh. S. 66; S. *v.* Hawkins (1890) 18 Or. 476, 23 Pac. Rep. 475; Thurston *v.* S. (1886) 21 Tex. App. 245, 17 S. W. Rep. 474; Burris *v.* S. (1895) 34 Tex. Cr. 387, 30 S. W. Rep. 785; Plew *v.* S. (Tex. Cr. 1896) 35 S. W. Rep. 366; Carter *v.* S. (1896) 37 Tex. Cr. 403, 35 S. W. Rep. 378.

[4] S. *v.* Scott (1889) 41 Minn. 365, 43 N. W. Rep. 62.

[5] De Arman *v.* S. (1882) 71 Ala. 351; S. *v.* Rider (1886) 90 Mo. 54, 1 S. W. Rep. 825; Cartwright *v.* S. (1883) 14 Tex. App. 486; Ball *v.* S. (1890) 29 Tex. App. 107, 14 S. W. Rep. 1012; Airhart *v.* S. (1899) 40 Tex. Cr. 470, 51 S. W. Rep. 214; Mozee *v.* S. (Tex. Cr. 1899) 51 S. W. Rep. 250; Johnson *v.* S. (Tex. 1899) 66 S. W. Rep. 845. But see Gafford *v.* S. (1898) 122 Ala. 54, 25 So. Rep. 10.

of the circumstances as a pretext for carrying out the previous purpose or design. If that is not true, the existence of such purpose or design should not debar him from the right of defending himself or his father, to the extent the right would exist, if he had never entertained such purpose or formed such design."[1] "The mere intention to provoke a difficulty will not forfeit appellant's right of self-defence, but at the time of the difficulty he must then and there do some act or make some declaration evidencing an intention and calculated to provoke a difficulty, before his right of self-defence is forfeited."[2]

Having brought on the difficulty with the intention of killing his adversary in it, the defendant, as has been said, cannot excusably kill even in the greatest extremity. If he is driven to the wall or thrown to the ground, and must kill or die, he has no right to kill."[3] But if he is able to escape from the difficulty entirely, the conflict which he has brought on having ceased, the defendant may defend himself from a subsequent attack by his adversary, even though it be an immediate renewal of the conflict. "While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his adversary to save his own. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as, at the same time, to manifest his own good faith and to remove any just apprehension from his adversary, he is again remitted to his right of self-defence."[4] In the case from which these words are quoted the assailant broke away from his antagonist, ran into a house and closed the door; he was held entitled to protect himself against his antagonist, who followed him, broke open the door, and renewed the attack.

In a few cases it appears to be held that if the assailant does all that he can to decline further difficulty, and manifests that intention to his adversary, but is unable to escape, he may kill in self defence.[5]

[1] Kerr *v.* S. (1894) 106 Ala. 1, 17 So. Rep. 328.

[2] Hall *v.* S. (Tex. 1902) 66 S. W. Rep. 783.

[3] S. *v.* Hill, 4 D. & B. 491.

[4] Stoffer *v.* S. (1864) 15 Oh. S. 47, Hor. & Th. Cas. Self Defence 213; S. *v.* Smith (1875) 10 Nev. 106.

[5] P. *v.* Wong Ah Teak (1883) 63 Cal. 544; Burris *v.* S. (1895) 34 Tex. Cr. 387, 30 S. W. Rep. 785.

Whatever may be said in favor of this opinion when the defendant brought on the difficulty without the intention to kill, it seems to be quite inadmissible in this class of cases.

§ 5. Necessity Caused by the Defendant, but not Maliciously.

The party who is to blame for the conflict, but acted without intent to kill his adversary, cannot excuse a killing during the conflict unless he has in some way freed himself from blame before killing. He cannot take advantage of a necessity which he has contributed to produce.[1]

[1] Lewis *v.* S. (1874) 51 Ala. 1; Myers *v.* S. (1878) 62 Ala. 599; Leonard *v* S. (1880) 66 Ala. 461; Page *v.* S. (1881) 69 Ala. 229; Wills *v.* S. (1882) 73 Ala. 362; Jones *v.* S. (1885) 79 Ala. 23; Jackson *v.* S. (1886) 81 Ala. 33, 1 So. 33; Baker *v.* S. (1886) 81 Ala. 38; Cleveland *v.* S. (1888) 86 Ala. 1, 5 So. Rep. 426; Lewis *v.* S. (1889) 88 Ala. 11, 6 So. Rep. 755; Rutledge *v.* S. (1889) 88 Ala. 85, 7 So. Rep. 335; Rains *v.* S. (1889) 88 Ala. 91, 7 So. Rep. 315; Kirby *v.* S. (1889) 89 Ala. 63, 8 So. Rep. 110; Boulden *v.* S. (1893) 102 Ala. 78, 15 So. Rep. 341; Scoggins *v.* S. (1898) 120 Ala. 369, 25 So. Rep. 180; Teague *v.* S. (1898) 120 Ala. 309, 25 So. Rep. 209; Kilgore *v.* S. (1899) 124 Ala. 24, 27 So. Rep. 4; Abernathy *v.* S. (1900) 129 Ala. 85, 29 So. Rep. 844; Maxwell *v.* S. (1900) 129 Ala. 48, 29 So. Rep. 981; Blair *v.* S. (1901) 69 Ark. 558, 64 S. W. Rep. 948; P. *v.* Lamb (1861) 17 Cal. 323; P. *v.* Westlake (1882) 62 Cal. 303; P. *v.* Newcomer (1897) 118 Cal. 263, 50 Pac. Rep. 405; P. *v.* Reed (Cal. 1898) 52 Pac. Rep. 835; P. *v.* Phelan (1899) 123 Cal. 551, 56 Pac. Rep. 424; Padgett *v.* S. (1898) 40 Fla. 451, 24 So. Rep. 145; Kennard *v.* S. (1900) 42 Fla. 581, 28 So. Rep. 858; Mitchell *v.* S. (1857) 22 Ga. 211; Coney *v.* S. (1892) 90 Ga. 140, 15 S. E. Rep. 746; Adams *v.* P. (1868) 47 Ill. 376; Deilkes *v.* S. (1894) 141 Ind. 23; 40 N. E. Rep. 120; Voght *v.* S. (1895) 145 Ind. 12, 43 N. E. Rep. 1049; S. *v.* Benham (1867) 23 Ia. 154; S. *v.* Rogers (1877) 18 Kan. 78; S. *v.* Hatch (1896) 57 Kan. 420, 46 Pac. Rep. 708; C. *v.* Hourigan (1889) 89 Ky. 305, 12 S. W. Rep. 550; Godfrey *v.* C. (Ky. 1893) 21 S. W. Rep. 1047; Combs *v.* C. (1894) 15 Ky. L. Rep. 659, 25 S. W. Rep. 592; Boner *v.* C. (1897) 19 Ky. L. Rep. 409, 40 S. W. Rep. 700; Blankenship *v.* C. (1902) 23 Ky. L. Rep. 1995, 66 S. W. Rep. 994; S. *v.* Kellogg (1900-1901) 104 La. 580, 29 So. Rep. 285; S. *v.* Scott (1889) 41 Minn. 365, 43 N. W. Rep. 62; S. *v.* Starr (1866) 38 Mo. 270; S. *v.* Linney (1873) 52 Mo. 40; S. *v.* Hudson (1875) 59 Mo. 135; S. *v.* Brown (1877) 64 Mo. 367; S. *v.* Johnson (1882) 76 Mo. 121; S. *v.* Peak (1884) 85 Mo. 190; S. *v.* Partlow (1886) 90 Mo. 608, 4 S. W. Rep. 14; S *v.* Rose (1887) 92 Mo. 201, 4 S. W. Rep. 733; S. *v.* Davidson (1888) 95 Mo. 155, 8 S. W. Rep. 413; S. *v.* Hardy (1888) 95 Mo. 455, 8 S. W. Rep. 416; S. *v.* Parker (1891) 106 Mo. 217, 17 S. W. Rep. 180; Parrish *v.* S. (1883) 14 Neb. 60, 15 N. W. Rep. 357; S. *v.* Brittain (1883) 89 N. C. 481; S. *v.* Ballou (1898) 20 R. I. 607, 40 Atl. Rep. 861; S. *v.* Beckham (1885) 24 S. C. 283; S. *v.* Wyse (1890) 33 S. C. 582, 12 S. E. Rep. 556; S. *v.* Trammell (1893) 40 S. C. 331, 18 S. E. Rep. 940; S. *v.* Petsch (1894) 43 S. C. 132, 20 S. E. Rep. 993; S. *v.* Whittle (1900) 59 S. C. 297, 37 S. E. Rep. 923; Smith *v.* S. (1900) 105 Tenn. 305, 60 S. W. Rep. 145; Gilleland *v.* S. (1875) 44 Tex. 356; Logan *v.* S. (1884) 17 Tex. App. 50; Cahn *v.* S. (1889) 27 Tex. App. 709, 11 S. W. Rep. 723; Polk *v.* S. (1892) 30 Tex. App. 657, 18 S. W. Rep. 466; Sullivan *v.*

The blameworthy conduct must usually be such provocation to combat as would be a natural cause for attack by the other party.[1] The speaking of taunting words which would not naturally provoke a murderous attack is not enough to deprive the defendant of his right of self-defence,[2] unless the purpose of the defendant was to bring about the attack.[3]

In Texas it is held apparently that the defendant is not deprived of the right of self-defence, unless he, not only provoked the difficulty, but intended to do so;[4] and if he intended to provoke the difficulty and did so, he cannot excuse killing, though the means used were not reasonably adapted to provoke such a contest.[5]

The Texas rule, making intention to provoke a contest the test of right to self-defence, is probably peculiar to that state.

A mere trespass by the defendant, not intended or expected to bring on a quarrel, is not enough to deprive him of the right to self-defence. Thus if the defendant went to

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S. (1893) 31 Tex. Cr. 486, 20 S. W. Rep. 927; Fisher *v.* S. (Tex. 1894) 26 S. W. Rep. 67; Lawrence *v.* S. (1896) 36 Tex. Cr. 173, 36 S. W. Rep. 90; Hawkins *v.* S. (Tex. 1896) 36 S. W. Rep. 443; Matthews *v.* S. (Tex. 1900) 58 S W. Rep. 86; Johnson *v.* S. (Tex. 1900) 60 S. W. Rep. 45; Vaiden's Case (1855) 12 Gratt. 717; Gaines *v.* C. (1892) 88 Va. 682, 14 S. E. Rep. 375; Jackson *v.* C. (1900) 98 Va. 845, 36 S. E. Rep. 487; Frank *v.* S. (1896) 94 Wis. 211, 68 N. W. Rep. 657.

The defendant must have been absolutely free from fault; to be reasonably so is not sufficient. Johnson *v.* S. (1893) 102 Ala. 1, 16 So. Rep. 99; Gibson v. S. (Ala. 1894) 16 So. Rep. 144; Howard *v.* S. (1895) 110 Ala. 92, 20 So. Rep. 365; Nabors *v.* S. (1898) 120 Ala. 323, 25 So. Rep. 529; Welch *v.* S. (1899) 124 Ala. 41, 27 So. Rep. 307.

[1] The notion which appears to be held in Georgia (Butler *v.* S. (1893) 92 Ga. 601, 19 S. E. Rep. 51; Fussell *v.* S. (1893) 94 Ga 78, 19 S. E. Rep. 891) that it must be sufficient to justify an assault by the other party is not sound.

[2] Boatwright *v.* S. (1892) 89 Ga. 140, 15 S. E. Rep. 21; Butler *v.* S. (1893) 92 Ga. 601, 19 S. E. Rep. 51; Bennyfield *v.* C. (1891) 13 Ky. L. Rep. 446, 17 S. W. Rep. 271.

[3] Butler *v.* S. *supra.*

[4] Saens *v.* S. (Tex. 1892) 20 S. W. Rep. 737; Thornton *v.* S. (Tex. 1901) 65 S.W. Rep. 1105.

[5] Matthews *v.* S. (Tex. 1900) 58 S. W. Rep. 86: "The whole matter turns upon appellant's intent, and the results of his intent." Yet in the latest case, Thornton *v.* S *supra,* the court says: "The law of provoking the difficulty is predicated upon the intent with which defendant commits the act, and upon the reasonableness or unreasonableness of the provocation." The question of reasonableness seems nevertheless to be really unimportant in Texas.

the house or premises of the deceased for the purpose of bringing about a friendly issue of the quarrel, even though he went armed for his own defence in case of necessity, he is not deprived of the right of self-defence in a contest which was begun by the deceased.[1] So where the defendant went uninvited, but withdrew at the request of the deceased, he may defend himself against an attack by the deceased;[2] and even if he went for a criminal purpose he could defend himself if murderously attacked while withdrawing.[3] But if the defendant comes to the house of another rightfully, and afterwards insists upon remaining, though he has been ordered off by the owner, he cannot excuse a killing in the struggle which follows.[4]

An early decision in California seems opposed to this doctrine, and to a later case in the same court. The defendant armed himself and went to an island in the possession of another, to which the defendant had a right. The occupant resisting the defendant's entrance, the defendant entered upon a contest and eventually killed the occupant. He was held excusable.[5] But in a later case, where the facts were similar, the occupant was held excusable for killing in his own defence the intruding owner.[6]

The act of adultery is one of such provocation to the husband that the paramour taken in the act cannot excuse himself for killing the husband, even if it was necessary to save his own life;[7] and conversely, even though the husband makes the first attack he is not deprived of the right to kill in self-defence, since he is not the original aggressor,

[1] Hall *v.* S. (Tex. 1901) 60 S. W. Rep. 769; Watson *v.* C. (1891) 87 Va. 608, 13 S. E. Rep. 22.

[2] S. *v.* Archer (1886) 69 Ia. 420, 29 N. W. Rep. 333.

[3] Felker *v.* S. (1891) 54 Ark. 489, 16 S. W. Rep. 663; Luera *v.* S. (1882) 12 Tex. App. 257. *A fortiori* where the purpose was to take a dog wrongfully, but not by an act of larceny. S. *v.* Perigo (1886) 70 Ia. 657, 28 N. W. Rep. 452. Even if a thief is carrying off his booty he may defend himself against a murderous attack not intended as an effort to arrest; see Luera *v.* S. *supra.*

[4] Hall *v.* S. (1900) 130 Ala. 45, 30 So. Rep. 422; S. *v.* Trammell (1893) 40 S. C. 331; 18 S. E. Rep. 940.

[5] P. *v.* Batchelder (1864) 27 Cal. 70.

[6] P. *v.* Stone (1889) 82 Cal. 36; 22 Pac. Rep. 975.

[7] Dabney *v.* S. (1896) 113 Ala. 38, 21 So. Rep. 211; Drysdale *v.* S. (1889) 83 Ga. 744, 10 S. E. Rep. 358.

or responsible for the contest.[1] But if the husband makes the attack long after his discovery of the act, or if he knew of the adultery and condoned it before his discovery of the parties in the act, the act is not such provocation to attack as will deprive the paramour of the right of self-defence.[2] And where the defendant's conduct, while improper, is not so suspicious as naturally to provoke a serious assault by the husband, the defendant (not being in fact an adulterer) may act in self-defence.[3]

Self-defence, though it may not justify a homicide, may nevertheless show that the killing was manslaughter, rather than murder. If a defendant was the aggressor, intending to kill in the contest, his killing is murder, though it was necessary for his defence. If, however, he began the quarrel not intending to kill, and killed in necessary self-defence without retreating or attempting to retreat, his act is manslaughter.[4] It cannot properly be said under such circumstances that there is a *right* of self-defence; yet in a few cases it has been held error to charge in such a case that there is no right of self-defence.[5] The error of confusion is obvious.

§6. NECESSITY CAUSED BY MUTUAL ACTS OF THE PARTIES.

The blame for the combat need not be altogether the defendant's in order to oust him of his right of self-defence. If the defendant and his victim fought by mutual consent, neither can excuse a killing of the other in self-defence.[6]

[1] S. *v.* Cancienne (1898) 50 La. Ann. 847, 24 So. Rep. 134.

[2] Wilkerson *v.* S. (1893) 91 Ga. 729, 17 S. E. Rep. 990.

[3] Franklin *v.* S. (1892) 30 Tex. App. 628, 18 S. W. Rep. 468.

[4] The leading case on this distinction is S. *v.* Partlow (1886) 90 Mo. 608, 4 S. W. Rep. 14.

[5] Prine *v.* S. (1896) 73 Miss. 838, 19 So. Rep. 711; S. *v.* Evans (1895) 128 Mo. 406, 31 S. W. Rep. 34; S. *v.* Goddard (1898) 146 Mo. 177, 48 S. W. Rep. 82; S. *v.* Foutch (1895) 95 Tenn. 711, 34 S. W. Rep. 423; Roach *v.* S. (1886) 21 Tex. App. 249, 17 S. W. Rep. 464; Hash *v.* C. (1891) 88 Va. 172, 13 S. E. Rep. 398. In Missouri and Virginia the error has been corrected in later cases. S. *v.* Patterson (1900) 159 Mo. 560, 60 S. W. Rep. 1047; Jackson *v.* C. (1900) 98 Va. 845, 36 S. E. Rep. 487.

[6] Wallace *v.* U. S. (1896) 162 U. S. 466; Kimbrough *v.* S. (1878) 62 Ala. 248; Dolan *v.* S. (1883) 40 Ark. 454; Duncan *v.* S. (1887) 49 Ark. 543, 6 S. W. Rep. 164; Moore *v.* P. (1899) 26 Col. 213, 57 Pac. Rep. 857; Story *v.* S. (1884) 99 Ind. 413; S. *v.* Spears (1894) 46 La. Ann. 1524, 16 So. Rep. 467; Swanner *v.* S. (Tex. 1900) 58 S. W. Rep. 72; Clark *v.* C. (1893) 90 Va. 360, 18 S. E. Rep. 440; Jackson *v.* C. (1900) 98 Va. 845, 36

§ 7. RETREAT TO THE WALL.

One who, being to blame for a conflict, cannot excuse a killing in the course of it, may free himself from responsibility by withdrawing from the conflict; and if after such withdrawal he is attacked by the other party, who thus renews the quarrel, he may defend himself.[1] This is ordinarily called "retreating to the wall."

The object of this withdrawal is neither to avoid the necessity of killing nor to purge oneself of malice; it is merely to escape responsibility for further contest, and to throw such responsibility, if the contest continues, upon the adversary. The defendant was a cause of the original conflict; he can cease to be such cause only by ceasing to excite his adversary to conflict. The only method of putting an end to the force he has set in motion by his original attack is to let his adversary know that he desires to withdraw; or at least to do acts which ought to convey that knowledge to the adversary. Consequently, on the one hand the desire to withdraw, without the power to do so, should not be enough to give the right of self-defence; and on the other hand, if the defendant does actually withdraw far enough to evince his *bona fide* desire to end the

S. E. Rep. 487. This seems not to be law in California so long as the mutual combat was a fair fight on the defendant's part; if it was, he may justify killing in self-defence. P. *v.* Barry (1866) 31 Cal. 357; P. *v.* Perdue (1874) 49 Cal. 425. In Georgia, where the defendant agreed to a fight with fists he was held excused for killing in self-defence his adversary who insisted on using a pistol. Barton *v.* S. (1895) 96 Ga. 435, 23 S. E. Rep. 827. Of course if the defendant entered into the combat merely to defend himself, as he had a right to do, he does not thereby forfeit the right to kill in self-defence if necessary. Bradburn *v.* U. S. (1901) 3 Ind. Terr. 604, 64 S. W. Rep. 550; S. *v.* Rapp (1898) 142 Mo. 443, 44 S. W. Rep. 270.

[1] Rowe *v.* U. S. (1896) 164 U. S. 546; Stilwell *v.* S. (1894) 107 Ala. 16, 19 So. Rep. 322; Johnson *v.* S. (1893) 58 Ark. 57, 23 S. W. Rep. 7; P. *v.* Hecker (1895) 109 Cal. 451, 42 Pac. Rep. 307; P. *v.* Conkling (1896) 111 Cal. 616, 44 Pac. Rep. 314; Hittner *v.* S. (1862) 19 Ind. 48; S. *v.* Perigo (1886) 70 Ia. 657, 28 N. W. Rep. 452; Terrell *v.* C. (1877) 13 Bush 246; Crane *v.* C. (1890) 12 Ky. L. Rep. 161, 13 S. W. Rep. 1079; Massie *v.* C. (1895) 16 Ky. L. Rep. 790, 29 S. W. Rep. 871; S. *v.* Thompson (1893) 45 La. Ann. 969, 13 So. Rep. 395; Hunt *v.* S. (1894) 72 Miss. 413, 16 So. Rep. 753; S. *v.* Cable (1893) 117 Mo. 380, 22 S. W. Rep. 953; S. *v.* Vaughan (1897) 141 Mo. 514, 42 S. W. Rep. 1080; S. *v.* Adler (1898) 146 Mo. 18, 47 S. W. Rep. 794; Brazzil *v.* S. (1890) 28 Tex. App. 586, 13 S. W. Rep. 1006; Wills *v.* S. (Tex. 1893) 22 S. W. Rep. 969; Lindsey *v.* S. (1895) 35 Tex. Cr. 164, 32 S. W. Rep. 768; Hash *v.* C. (1891) 88 Va. 172, 13 S. E. Rep. 398.

contest, he may act in self-defence, though the conflict may in fact never have come to an end.

The authorities are not universally satisfactory. Thus it has been held that if the defendant is so hard pressed as to be unable to withdraw safely, he may excuse killing in self-defence; though he is clearly to blame for the situation.[1] The true doctrine is, however, often recognized, and it is laid down that the defendant must have evinced his desire to withdraw by some act sufficient to inform his adversary.[2] "The conduct of the accused relied upon to sustain such a defence must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but such also as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault."[3]

It is enough, generally, that the deceased had reasonable grounds for believing that the defendant had withdrawn.[4] "The assailed * * * must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless. Yet, in considering this question, the assailed must be deemed a man of ordinary understanding. * * * The law will not allow him to say, 'I was not aware that my assailant had withdrawn from the combat in good faith,' if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see, he must see; and, if he has ears to hear, he must hear. He has no right to close his eyes or deaden his ears."[5]

A California case presented an unusual problem. By

[1] Johnson *v.* S. (1893) 58 Ark. 57, 23 S. W. Rep. 7 (*semble*); P. *v.* Simons (1882) 60 Cal. 72; P. *v.* Bush (1884) 65 Cal. 129, 3 Pac. Rep. 590; P. *v.* Robertson (1885) 67 Cal. 646, 8 Pac. Rep. 600 (*semble*); S. *v.* Peo. (1889) 9 Houst. (Del.) 488, 33 Atl. Rep. 257; S. *v.* Partlow (1886) 90 Mo. 608, 4 S. W. Rep. 14; Roach *v.* S. (1886) 21 Tex. App. 249, 17 S. W. Rep. 464; S. *v.* Greer (1883) 22 W. Va. 800 (*semble*).

[2] S. *v.* Horne (1872) 9 Kan. 119; S. *v.* Kellogg (1901) 104 La. 580, 29 So. Rep. 285; S. *v.* Edwards (1893) 112 N. C. 901, 17 S. E. Rep. 521; S. *v.* Smith (1875) 10 Nev. 106.

[3] RANNEY, J. in Stoffer *v.* S. (1864) 15 Oh. S. 47.

[4] S. *v.* Dillon (1888) 74 Ia. 653, 38 N. W. Rep. 525.

[5] GAROUTTE, J. in P. *v.* Button (1895) 106 Cal. 628, 39 Pac. Rep. 1073.

the assault of the defendant the deceased had been so injured that he was unable to realize that his assailant was withdrawing; he attacked the defendant so strongly that to save his life the defendant was obliged to kill. The court at first held that since a reasonable man would have known that the defendant was withdrawing, the latter might lawfully defend himself.[1] Upon a subsequent appeal, however, while affirming the principle laid down in the earlier decision, the court held that since the inability to realize the fact of retreat was due to the defendant's fault, the defendant could not excuse the killing.[2]

In order to enable the defendant to act in self-defence, the withdrawal must be *bona fide*, not a mere colorable retirement to enable the defendant the better to accomplish his purpose;[3] and he must withdraw completely, unless he is prevented by some obstacle.[4]

§ 8. Resistance without Retreat.

In many jurisdictions it is held that one who, being without fault, is murderously assailed may stand his ground and justifiably kill his assailant, even though he might safely retreat and thus avoid the necessity of killing.[5] In

[1] P. *v.* Button (Cal. 1894), 38 Pac. Rep. 200.

[2] P. *v.* Button (1895) 106 Cal. 628, 39 Pac. Rep. 1073.

Parker *v.* S. (1889) 88 Ala. 4, 7 So. Rep. 98; P. *v.* Farley (1899) 124 Cal. 594, 57 Pac. Rep. 571; Roach *v.* S. (1886) 21 Tex. App. 249, 17 S. W. Rep. 464.

[4] Crawford *v.* S. (1895) 112 Ala. 1, 21 So. Rep. 214; Roberts *v.* S. (1891) 30 Tex. App. 291, 17 S. W. Rep. 450.

[5] La Rue *v.* S. (1897) 64 Ark. 144, 41 S. W. Rep. 53 (but see Elder *v.* S. (1901) 69 Ark. 648, 65 S. W. Rep. 938), apparently overruling McPherson *v.* S. (1874) 29 Ark. 225; Levells *v.* S. (1877) 32 Ark. 585; P. *v.* Flahave (1881) 58 Cal. 249; P. *v.* Hecker (1895) 109 Cal. 451, 42 Pac. Rep. 307 (*semble*); P. *v.* Lewis (1897) 117 Cal. 186, 48 Pac. Rep. 1088 (*semble*); Ritchey *v.* P. (1896) 23 Col. 314, 47 Pac. 272 (statutory); Ragland *v.* S. (1900) 111 Ga. 211, 36 S. E. Rep. 682; Runyan *v.* S. (1877) 57 Ind. 80; Page *v.* S. (1894) 141 Ind. 236, 40 N. E. Rep. 745; S. *v.* Reed (1897) 53 Kan. 767, 37 Pac. Rep. 174; S. *v.* Hatch (1896) 57 Kan. 420, 46 Pac. Rep. 708; Holloway *v.* C. (1875) 11 Bush 344; McClurg *v.* C. (1896) 17 Ky. L. Rep. 1339, 36 S. W. Rep. 14; S. *v.* West (1893) 45 La. Ann. 14, 12 So. Rep. 7; Conner *v.* S. (Miss. 1893), 13 So. Rep. 934; McCall *v.* S. (Miss. 1901), 29 So. Rep. 1003; S. *v.* Hudspeth (1899) 150 Mo. 12, 51 S. W. Rep. 483, apparently overruling S. *v.* Dettmer (1894) 124 Mo. 426, 27 S. W. Rep. 1117 and S. *v.* Wright (1897) 141 Mo. 333, 42 S. W. Rep. 934; S. *v.* Bartlett (1902) 170 Mo. 658, 71 S. W. Rep. 148; Willis v. S. (1894) 43 Neb. 102, 61 N. W. Rep. 254; S. *v.* Kennedy (1872) 7 Nev. 374; Erwin *v.* S. (1876) 29 Oh. S. 186; Hays *v.* T. (Okl. 1897). 52 Pac. Rep. 950; Nalley *v.* S. (1891) 30 Tex. App. 456, 17 S. W. Rep. 1084 (statutory); Stoneham *v.* C. (1889) 86 Va. 523, 10 S. E. Rep. 238 (*semble*).

other jurisdictions, on the contrary, it is held that if the necessity of killing may be safely avoided by retreating, the party assailed must retreat, rather than kill.[1]

The arguments in favor of the former opinion are that to require a retreat is to force the assailed to yield a right at the bidding of a wrongdoer; and that it is dishonorable to retreat, and the necessity of such dishonor must not be thrust upon one who is without fault. On the other side it is urged that one may, under certain circumstances, be forced to forego the exercise of a legal right, and that the exercise of a right, when such exercise involves the commission of a public offence, can be justified only when it is required by public policy; and that between the killing and the safe retreat of a human being public policy requires the latter.[2]

Even in those jurisdictions which require one assailed to withdraw, if he can, rather than kill, retreat is not required where it clearly would not diminish the danger.[3] For this reason one is not required to retreat from his

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[1] Allen *v.* U. S. (1896) 164 U. S. 492, explaining Beard *v.* U. S. (1895) 158 U. S. 550; U. S. *v.* King (1888) 34 Fed. Rep. 302; Pierson *v.* S. (1847) 12 Ala. 149; Poe *v.* S. (1888) 87 Ala. 65, 6 So. Rep. 378; Holmes *v.* S. (1893) 100 Ala. 80, 14 So. Rep. 864; Henson *v.* S. (1896) 120 Ala. 316, 25 So. Rep. 23; Abernathy *v.* S. (1900) 129 Ala. 85, 29 So. Rep. 844; S. *v.* Newcomb (1858) 1 Houst. (Del.) Cr. 66; S. *v.* Brown (Del. 1902) 53 Atl. Rep. 354; U. S. *v.* Herbert (1856) 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354*a*; Davison *v.* P. (1878) 90 Ill. 221; S. *v.* Donnelly (1886) 69 Ia. 705, 27 N. W. Rep. 369; S. *v* Jones (1893) 89 Ia. 182, 56 N. W. Rep. 427, overruling Tweedy *v.* S. (1857) 5 Ia. 433; S. *v.* Warner (1896) 100 Ia. 260, 69 N. W. Rep. 546; Pond *v.* P. (1860) 8 Mich. 150 (*semble*); S. *v.* Rheams (1885) 34 Minn. 18, 24 N. W. Rep. 302; P. *v.* Sullivan (1852) 7 N. Y. 396; P. *v.* Constantino (1897) 153 N. Y. 24, 47 N. E. Rep. 37; P. *v.* Kennedy (1899) 159 N. Y. 346, 54 N. E. Rep. 51; S. *v.* Gentry (1899) 125 N. C. 733, 34 S. E. Rep. 706, explaining S. *v.* Dixon (1876) 15 N. C. 275; C. *v.* Drum (1868) 58 Pa. 9; C. *v.* Ware (1890) 137 Pa. 465, 20 Atl. Rep. 806; C. *v.* Breyesse (1894) 160 Pa. 451, 28 Atl. Rep. 824; S. *v.* Summer (1898) 55 S. C. 32, 32 S. E. Rep. 771; S. *v.* Roberts (1890) 63 Vt. 139, 21 Atl. Rep. 424; S. *v.* Zeigler (1895) 40 W. Va. 593, 21 S. E. Rep. 763 (see S. *v.* Cain (1882) 20 W. Va. 679; S. *v.* Evans (1890) 33 W. Va. 417, 10 S. E. Rep. 792); Bird *v.* S. (1890) 77 Wis. 276, 45 N. W. Rep. 1126 (*semble*).

[2] See this question discussed at length, 16 Harvard Law Review 567.

[3] S. *v.* Peo. (1890) 9 Houst. (Del.) 488, 33 Atl. Rep. 257; U. S. *v.* Herbert (1856) 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354*a*; P. *v.* Macard (1888) 73 Mich. 15, 40 N. W. Rep. 784; Conner *v.* S. (Mass. 1893), 13 So. Rep. 934; C. *v* Breyesse (1894) 160 Pa. 451, 28 Atl. Rep. 824; S. *v.* Roberts (1891) 63 Vt. 139, 21 Atl. Rep. 424 (*semble*); Bird *v.* S. (1890) 77 Wis. 276, 45 N. W. Rep. 1126. In Alabama the law requires retreat unless it would increase the danger. Carter *v.* S. (1886) 82 Ala. 13, 2 So. Rep. 766.

dwelling-house,[1] or even from his land in the immediate vicinity of his dwelling-house, to which he can retire in case of need;[2] though if he can withdraw from his yard to his house, and thus avoid the necessity for killing, he must do so,[3] and if he has voluntarily left his house he must continue to retreat.[4] One's place of business will be treated like his dwelling-house; he is entitled to remain there in safety.[5]

The doctrine that one need not retreat from his house is based upon the fact that such retreat would leave him exposed to attacks which his house is intended to protect him against. It is not merely an aspect of the doctrine which allows him to defend his dwelling-house from an attack from without. It follows, therefore, that one may stand his ground and repel a murderous assault by one who is already within the house, even one rightfully there.[6]

In a few authorities this rule is carried still further, and it is held that one need not retreat from his own premises, even though not in the vicinity of his house.[7] Most of these cases are from jurisdictions where the duty to retreat is not now enforced in any case of murderous attack; but the Supreme Court of the United States, which does not usually permit one to stand his ground and kill where retreat is open to him, appears not to require a retreat when the assailed is on his own premises, though remote from

[1] Albertz *v.* U. S. (1895) 162 U. S. 499; Rowe *v.* U. S. (1896) 164 U. S. 546; Brinkley *v.* S. (1890) 89 Ala. 34, 8 So. Rep. 22; Elder *v.* S. (1901) 69 Ark. 648, 65 S. W. Rep. 938; S. *v.* Middleham (1883) 62 Ia. 150, 17 N. W. Rep. 446; Eversole *v.* C. (1894) 95 Ky. 623, 26 S. W. Rep. 816; S. *v.* O'Brien (1896) 18 Mont. 1, 43 Pac. Rep. 1091; S. *v.* Harman (1878) 78 N. C. 515; Palmer *v.* S. (1899) 9 Wyo. 40, 59 Pac. Rep. 793.

[2] Naugher *v.* S. (1894) 105 Ala. 26, 17 So. Rep. 24; Haynes *v.* S. (1855) 17 Ga. 465; Wright *v.* C. (1887) 8 Ky. L. Rep. 718, 2 S. W. Rep. 909; Smith *v.* C. (1894) 16 Ky. L. Rep. 112, 26 S. W. Rep. 583; P. *v.* Lilly (1878) 38 Mich. 270; P. *v.* Kuehn (1892) 93 Mich. 619, 53 N. W. Rep. 721; Fitzgerald *v.* S., 1 Tenn. Cas. 505; S. *v.* Cushing (1896) 14 Wash 527, 45 Pac. Rep. 145.

[3] Watkins *v.* S. (1889) 89 Ala. 82, 8 So. Rep. 134.

[4] Martin *v.* S (1890) 90 Ala. 602, 8 So. Rep. 858.

[5] Askew *v.* S. (1891) 94 Ala. 4, 10 So. Rep. 657.

[6] Jones *v.* S. (1884) 76 Ala. 8.

[7] Foster *v.* T. (Ariz. 1899), 56 Pac. Rep. 738; Baker *v.* C. (1892) 93 Ky. 302, 19 S. W. Rep. 975; S. *v.* Hudspeth (1899) 150 Mo. 12, 51 S. W. Rep. 483 (premises or the public highway); *contra*, Lee *v.* S. (1890) 92 Ala. 15, 9 So. Rep. 407.

his house.[1] This distinction appears to be untenable. There can be no question here of depriving the assailed of the protection of a building; if he has a greater right than when off his own premises, it must be a right connected in some way with the defence of land. But there is no right to use fatal force in the defence of one's land.[2]

Where one is threatened with death unless he will give up a chattel he certainly need not retreat, leaving the chattel, rather than kill the assailant;[3] to yield would be to permit the assailant to commit robbery, and one may always kill to prevent the commission of such a felony. It has been attempted to apply this same reasoning to the ordinary case of murderous attack. Foster,[4] in a passage often quoted, says "the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either;" and he applies this rule to a case of murderous assault. And it is quite true that any violence, even killing, which is necessary to prevent the consummation of a violent felony is justifiable; but the killing, to be justified, must be necessary for the purpose. It is necessary in the case supposed to kill in order to prevent robbery; but, where one murderously assailed can safely escape by retreat, killing is not necessary to prevent murder.

If one not obliged to retreat can escape the necessity of killing by less serious violence, as by disarming the assailant or by knocking him down, he must do so.[5] Whether he must first call upon bystanders for help is not certainly determined; but it is probably not necessary as a matter of law.[6]

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[1] Allen *v.* U. S. (1896) 164 U. S. 492, 498, thus explaining Beard *v.* U. S. (1 94) 158 U. S. 550.

[2] Wallace *v.* U. S. (1895) 162 U. S. 466.

[3] P. *v.* Scott (1886) 69 Cal. 69, 10 Pac. Rep. 188; Stoneham *v.* C. (1889) 86 Va. 523, 10 S. E. Rep. 238.

[4] Crown Law 273.

[5] S. *v.* Middleham (1883) 62 Ia. 150, 17 N. W. Rep. 446; Tingle *v.* C. (1889) 11 Ky. L. Rep. 224, 11 S. W. Rep. 812; S. *v.* Kloss (1893) 117 Mo. 591, 23 S. W. Rep. 780; Childress *v.* S. (Tex. 1897) 43 S. W. Rep. 100; *contra* Rowe *v.* U. S. (1896) 164 U. S. 546.

[6] P. *v.* Lilly (1878) 38 Mich. 270; Bird *v.* S. (1890) 77 Wis. 276, 45 N. W. Rep. 1126; but see S. *v.* Mahan (1886) 68 Ia. 304, 20 N. W. Rep. 449.

§ 9. Preparation to Resist Attack.

No one is obliged to regulate his actions by the fear of future wrongdoing by another; he may properly assume that mere threats of crime to come will not be carried out. One whose life is threatened may therefore go about his lawful business regardless of the threats, and may arm himself for his own protection without thereby forfeiting any right to protect himself. So long as he does not by any wanton or wrongful act provoke his adversary, he may kill if necessary in self-defence in spite of the warning and the defensive arming.[1] In the earliest case of this nature, to be sure, this doctrine was not clearly expressed. "If one is in his house, and hears that such a one will come to his house to beat him, he may well assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace."[2] If in the case last supposed the Court means that the defendant went simply because he was threatened, and was quite willing to meet trouble half-way, we should have a case of mutual combat, and the conclusion of the Court would be right; but if he went in the ordinary course of business, the opinion cannot be supported. The Supreme Court of California has expressed the true doctrine:

"One who expects to be attacked is not always compelled to employ all the means in his power to avert the necessity of self-defence before he can exercise the right of self-defence. For one may know that if he travels along a

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[1] Gourko *v.* U. S. (1893) 153 U. S. 183; Thompson *v.* U. S. (1894) 155 U. S. 271; Allen *v.* U. S. (1896) 164 U. S. 492; Bohannon *v.* C. (1871) 8 Bush 481; C. *v.* Barnes (1891) 13 Ky. L. Rep. 163, 16 S. W. Rep. 457; Stricklin *v.* S. (Miss. 1893) 13 So. Rep. 898; Hunter *v.* S. (1896) 74 Miss. 515, 21 So. Rep. 305; S. *v.* Matthews (1898) 148 Mo. 185, 49 S. W. Rep. 1085; Wilson *v.* S. (Tex. 1896) 36 S. W. Rep. 587. This doctrine seems to be the reason for the decision in Beatty *v.* Gillbanks (1882) 15 Cox C. C. 138, 9 Q. B. D. 308; and the apparently contradictory decision of Wise *v.* Dunning [1902] K. B., 18 T. L. R. 85, probably turns on the wantonness of the defendant's act.

[2] FINEUX, C. J., in 21 H. 8, 39, pl. 50, translated Beale's Cases on Criminal Law 346.

certain highway he will be attacked by another with a deadly weapon and be compelled in self-defence to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack."[1]

As was said in a well-reasoned case by the Supreme Court of Missouri:

"If the mere expectation of an assault from an adversary is to deprive the expectant of the right of self defence, merely because he goes armed in the vicinity of his enemy, or goes out prepared upon the highway where he is likely at any moment to meet him, then he has armed himself in vain, and self defence ceases wherever expectation begins. We do not so understand the law. The very object of arming one's self is not to destroy expectation of a threatened attack, but to be prepared for it should it unfortunately come."[2]

§ 10. Resistance to a Less Serious Attack.

We have so far been considering the force which is justifiable in resisting a serious attack that is, one which threatens the death or serious bodily harm of the party assailed. An attack which does not appear to endanger life or limb may be resisted justifiably, but the resistance must extend no further than the occasion demands.[3] Thus in repelling such an assault the assailed must not voluntarily kill, nor must he make use of a dangerous weapon.[4] So a mere unlawful arrest cannot justifiably be resisted by deliberately killing the wrongdoer,[5] though reasonable force may be used in resistance;[6] and, while one may use reasonable force to defend his possession either of ordinary

[1] Foote, C. in P. *v.* Gonzales (1887) 71 Cal. 569, 578, 12 Pac. Rep. 783.

[2] S. *v.* Evans (1894) 124 Mo. 397, 28 S. W. Rep. 8.

[3] Hayden *v.* S. (1838) 4 Blackf. 546; P. *v.* McGrath (1888) 13 N. Y. St. Rep. 359; Freeman *v.* S. 40 Tex. Cr. 545, 46 S. W. 641.

[4] Scales *v.* S. (1891–2) 96 Ala. 69, 11 So. 121; Floyd *v.* S. (1867) 36 Ga. 91; Smith *v.* S. (1895) 142 Ind. 288, 41 N. E. 595; S. *v.* Ferguson (1887) 26 Mo. App. 8; Taylor *v.* S. (1898) 38 Tex. Cr. 552, 43 S. W. 1019.

[5] Noles *v.* S. (1855) 26 Ala. 31; Creighton *v.* C. (1886) 84 Ky. 103.

[6] C. *v.* Delaney (1895) 16 Ky. L. Rep. 509, 29 S. W. 616.

property or of his dwelling-house,[1] he may not intentionally kill or even use a dangerous weapon even to eject an intruder from his land or house.[2]

But if the assailed chooses to meet force by force, he may when thus assailed stand his ground and defend himself by reasonable force; he need not retreat even if he might safely do so.[3] Even here, of course, if the defendant was to blame for the quarrel, he cannot justify a battery without retreating.[4] If the assailed resists the attack with no more than reasonable force he will be justified, though in the course of the resistance he accidentally kills;[5] and if the resistance leads to an increase in the violence of the attack, and the assailed thereupon finds it necessary to kill in order to protect his life, he may justifiably kill.

[1] Meade's Case, 1 Lewin 184 (*semble*); C. *v.* Donahue (1889) 148 Mass. 529.

[2] Meade's Case 1 Lewin 184; Carroll *v.* S. (1853) 23 Ala. 28; S. *v.* Montgomery (1885) 65 Ia. 483; S. *v.* Martin (1872) 30 Wis. 216.

[3] R. *v.* Knock (1877) 14 Cox C. C. 1; R. *v.* Bond (1877) 14 Cox C. C. 2; Gallagher *v.* S. (1859) 3 Minn. 270; S. *v.* Sherman (1889) 16 R. I. 631, 18 Atl. 1040.

[4] R. *v.* Knock (1877) 14 Cox C. C. 1; Johnson *v.* S. (1881) 69 Ala. 253.

[5] S. *v.* Trusty (Del. 1898) 40 Atl. 766; C. *v.* Delaney (1895) 16 Ky. L. Rep. 509, 29 S. W. 616.

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